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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 100

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, ATKINSON-KIER COMPANY, *Petitioners*,

v.

THE UNITED STATES

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

SAMUEL T. ANSELL,
Counsel for Petitioners

Washington, D. C.,
November 7, 1946

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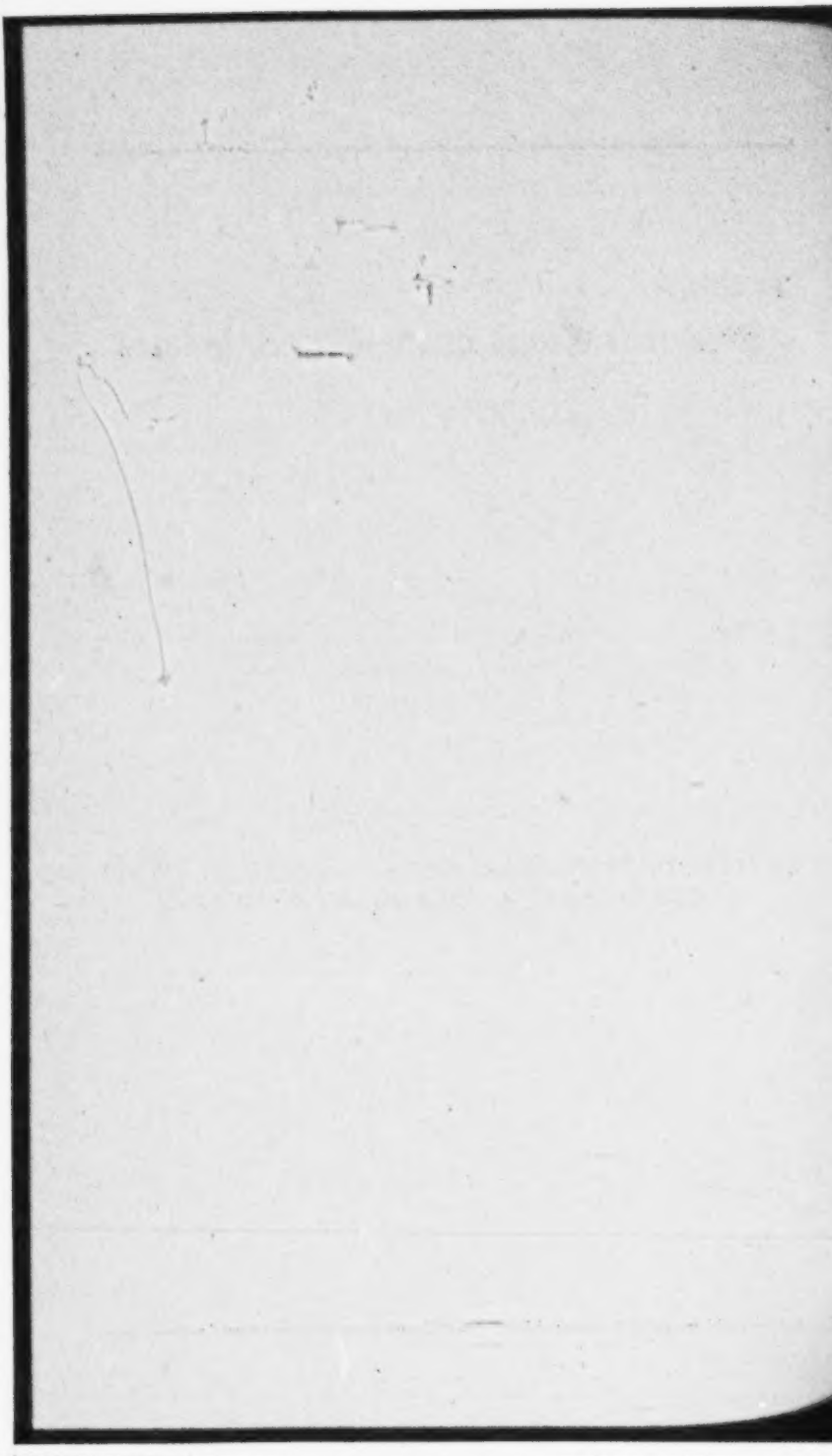

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Petitioners respectfully request this Court to reconsider its denial, October 14, 1946, of their petition for certiorari to the Court of Claims. They have been denied payment of several million dollars for work which they did on the Grand Coulee Dam by the orders of P. W. A. Administrator Ickes and his contracting officer. The Court of Claims denied petitioners the right to a judicial decision in that they did not first fully prosecute their appeals to Mr. Ickes, as required by Article 15 of the P. W. A. form contract. Their efforts to get justice under law are set forth in their Petition for Certiorari.

I

Article 15 has no place in this case. The original contract was abrogated by Order of Mr. Ickes. All work thereafter proceeded under that Order, which carried its own requirements, specifications, drawings and rates of pay. "In lieu" of the dam the contractors had contracted to build, the Order required them to build a structure which had no similarity to the one they contracted to build. It was vastly larger; entirely different in design; required different construction methods and materials; increased the $29,000,000 consideration of the original contract to $40,000,000, exclusive of these claims. The Order was not, and did not purport to be, a modification of the original contract. The Order, with its accompanying documents, constituted a new contract which expressly adopted some of the provisions of the original contract but did not, expressly or impliedly, bring forward Article 15. This crucial point the Court of Claims ignored.

II

But, if it could be assumed that Article 15 did become a part of the Order-contract, the record indisputably shows that, while the work was in progress, the contractors did, in the manner and form required, make appeals to Mr. Ickes from the contracting officer's adverse decisions. Mr. Ickes made no disposition of these appeals. In at least one such appeal the contracting officer failed to transmit the appeal to Mr. Ickes, without the contractors' knowledge or consent. Again, more than 8 months before the job was completed, the contractors formally protested to the contracting officer his requirements of work amounting to more than $500,000, but he merely held the protests and apparently never acted on them. Further, the contractors submitted to Mr. Ickes appeals from decisions of the contracting officer amounting to approximately $1,000,000, arising near the completion of the work, but the only action Mr.

Ickes ever took upon them was formally to refer them back to the contracting officer from whose decisions the appeals had been taken. Such evidence alone—and there is much more—conclusively shows the utter futility of appealing to Mr. Ickes. This too the Court of Claims ignored.

III

The work demanded of these contractors required vast expenditures, and to ignore or delay consideration of their appeals greatly aggravated the injury done them. From as far back, at latest, as the fall of 1937, these contractors had importuned Mr. Ickes to act upon their appeals. He requited them only with abuse. He refused to move until the contracting officer, from whose decisions the appeals were made, could decide some more. Nor would he hurry the contracting officer who, according to Mr. Ickes, was too busy laying out new work to settle the old. It was not until nearly a year after the job was completed that the contracting officer, gathering all his former decisions together, sent them on to Mr. Ickes as his last word. These were but a compilation or reiteration of his former decisions. In every instance and in every item they denied the contractors' claims. Then, nearly a year after the job was completed, Mr. Ickes presumably felt free to entertain the appeals, some of which the contractors had addressed to him 16 months before. This the Court of Claims ignored.

IV

So, at last, in February 1939, a year after the job had been completed and after the contractors had been pressing Mr. Ickes for more than 15 months to hear their appeals, he designated the department solicitor to hear the appeals. The Solicitor proposed or promised a procedure for his part in handling the appeals, and this procedure counsel stated was "entirely agreeable". Such a hearing would have had some advantage. That statement the Court of Claims seized upon as wiping out all the evidence of Mr.

Ickes' unfairness which had gone before. The court said: "Counsel did not then think that plaintiffs could not have a fair hearing on the appeal and, as we have concluded, nothing occurred thereafter which was a reason for changing his mind". Much did happen thereafter—much of departmental, evasiveness and delay—which did not change, but confirmed, counsel's mind. Since the Court of Claims based its decision upon its vague conjecture as to what counsel *"did not then think"*, we may appropriately state that, after 18 months' experience with Mr. Ickes, counsel and client did not then think, and as reasonable men they could not think, that Mr. Ickes would ever give them a fair hearing. Counsel and clients, however, knew then what an examination of the evidence so conclusively shows now: Mr. Ickes was constitutionally, immutably unfair.

Respectfully submitted,

SAMUEL T. ANSELL,
Counsel for Petitioners

Washington, D. C.,
November 7, 1946.

I certify that the above is presented in good faith and not for delay.

SAMUEL T. ANSELL,
Counsel